BOARD OF CIVIL SERVICE COMMISSIONERS
CITY OF LOS ANGELES

HEARING EXAMINER'S REPORT

Appellant	XXXXXXXXXX, Sr. Clerk Typist
Home Address	xxxxx Los Angeles, California 90062
Department	Los Angeles Police Department
Subject Matter	Appeal from Discharge Effective 7/14/00
Hearing Date(s) **Place(s)**	February 1 and 2, 2001 Personnel Department 700 East Temple Street Los Angeles, California 90012
Hearing Examiner	Ernest S. Gould
Representing the Department	Detective Latricia Simmons, Los Angeles Police Department Internal Affairs Group, Advocate Section
Representing the Appellant	Quentin B. Simms, Esq.
Commission Executive Assistant	Lupe Ortiz
Hearing Reporter(s)	Lupe Durazo (Day 1) Barbara Weinstein (Day 2)

To: Board of Civil Service Commissioners
City of Los Angeles

From: Ernest S. Gould, Hearing Examiner

Subject: Appeal from the Discharge of XXXXXXXXXX, effective July 14, 2000.
Commission File No. 50165.

CAUSES OF ACTION

Count 1. "On or about September 28, 1999, while off duty, Appellant carried a loaded, concealed handgun, without legal authority, when she should have known it was required."

Count 2. "On or about September 30, 1999, while off duty, Appellant documented false information on an official Los Angeles County Court Restraining Order, when she knew or should have known it was false."

Count 3. "Between approximately February 1, 1995 and March 31, 1995, Appellant, while off duty, unnecessarily choked H. Johnson's."

Count 4. "Between approximately February 1, 1995 and March 31, 1995, Appellant, while off duty, unnecessarily struck H. Johnson's face."

Count 5. "On or about October 26, 1999, Appellant, while on-duty, made false statements to Sergeants D. Davenport and W. Winston."

CASE SUMMARY AND CONTENTIONS

XXXXXXXXXX (hereinafter the "Appellant") has been employed by the Los Angeles Police Department (hereinafter the "Department" or the "Respondent") since approximately June, 1985. On September 28, 1999, she was a Senior Clerk Typist at the Wilshire Division.

She has been married to xxxxx since October, 1995 and had been in a relationship with him since 1992. That relationship and marriage had apparently been punctuated with incidents of physical violence and rage. They have been separated since September 28, 1999.

On September 28, 1999, Appellant and her husband argued by phone while both were away from their family home on Brighton Avenue in Los Angeles. Appellant apparently returned home in the early evening before her husband arrived, and retrieved a loaded 357 Magnum pistol from her home and placed it in her purse. She then walked several blocks to the

home of a friend, Vickie Jackson, who was also her hairdresser. The Jackson home and salon is on Dalton Avenue in Los Angeles.

While having her hair done at the Dalton Avenue residence (hereinafter "Dalton"), Appellant's husband appeared at the door in an angry state and called for the Appellant. She went to the door and an argument ensued, whereupon Mr. xxxxx threw a set of keys, hitting the Appellant on or near her left eye and causing injury to the eye and a facial bruise. By all accounts, Appellant became hysterical. Mr. xxxxx then walked back to his own home on Brighton (hereinafter "Brighton"). Either Appellant or her friend called the police, who responded to a domestic violence call at Dalton.

Appellant advised the responding officers that her husband was probably at home on Brighton and also warned them that he had several guns in the home.

Officers proceeded to the Brighton Avenue home and arrested Mr. xxxxx without incident. Appellant followed to Brighton in a private car driven by the hair dresser's sister, Jacqueline Jackson.

Appellant contends that she took the pistol and placed it in her purse earlier in the evening out of fear that her husband might use it on her. She also testified that she tried to locate and remove other guns in the home, but couldn't find them and was anxious to leave the premises before her husband arrived. She claims to have placed her purse containing the pistol in the back yard of the Dalton home while she went inside and was having her hair done.

She further contends that, while still at Dalton, she voluntarily told the responding police officers that she had a pistol in her purse, and turned it over to the police at the Dalton location.

The Department, on the other hand, contends that no such disclosure was made at Dalton but that they were first advised that Appellant had a pistol in her purse by Appellant's husband, who was under arrest and handcuffed outside the Brighton Avenue home when Appellant arrived there. The Department asserts that Appellant confirmed that she had a pistol in her purse at Brighton only when asked by an officer, and that the officer retrieved it from her purse at Brighton rather than Dalton, only after being alerted by Appellant's husband. These events at Dalton and Brighton on September 28, 1999 are referred to in this Report as the "Incident".

As cause for discharge, the Department, in Count 1, has alleged that during this Incident on September 28, 1999, Appellant carried a loaded concealed handgun without legal authority while she was off duty.

Two days later, and on or about September 30, 1999, Appellant applied for a domestic violence restraining order from the Los Angeles Superior Court, in which she declared under penalty of perjury that her husband "XXX had 4 weapons and the police found 2 of them" (Department Exhibit 2, p. OO).[1]

[1] The Department marked its exhibits in a somewhat unusual way in this matter. While it designated by

She also alleged the facts of the September 28 Incident, and stated the police ". . . found 2 guns at the premises which they took with them. They were unable to locate 2 of the guns that defendant [Mr. xxxxx] has."

Appellant's Declaration also related two other recent incidents in 1998 and 1999, respectively, in which she claimed to be the victim of abuse and physical violence. She also alleged that her husband has threatened to kill her (Department Exhibit 2, p. PP).

Based upon this Declaration, the Department apparently brought its Count 2 against the Appellant alleging that she documented false information on an official Los Angeles County Court Restraining Order. The allegedly false statement was apparently that the police had found two weapons (Department Exhibit 3, p. B). As a matter of fact, a police search of Brighton the night of the Incident turned up two BB or air guns, neither of which the police took.

In the third and fourth counts, the Department charged Appellant with unnecessarily choking her husband and/or striking him in the face while off duty sometime "between approximately February 1, 1995 and March 31, 1995." This charge was apparently based upon interviews with Appellant's husband and one of his co-workers.

Finally, the Department brought a fifth count alleging that on or about October 26, 1999, Appellant, while on duty, made false statements to Sergeants D. Davenport and W. Winston, who were investigating the 1999 Incident. The main statement claimed to be "false and misleading" was Appellant telling investigators that she voluntarily disclosed and gave the handgun in her purse to the officers while at the Dalton Avenue address. Appellant contends that statement was true.

Although not altogether clear in the record, the Department may also contend that Appellant made false and misleading statements to the Department's investigators to the effect that the police found two guns at her home on the night of the Incident and that they took those weapons with them.

Appellant contended that she saw the police with two weapons from her house that night and did not know whether they were "real" or just pellet guns, and assumed that the police took them.

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number only three exhibits, Exhibits 2 and 3 each consist of numerous unrelated documents, each such document being further identified by lettered pages. Exhibit 2, for example, consists of 32 or more different documents. Department Exhibit 3 also consists of several summaries and numerous paraphrased statements of the persons who participated in or who were knowledgeable about this matter.

For clarity, each such separate document is referred to herein by Department exhibit number and the lettered pages on which the document appears. Department Exhibit 2 has lettered pages going from A through UUUU. Department Exhibit 3 has lettered pages going from A through KK.

Based upon having each of these five charges deemed "sustained," the Department discharged Appellant effective July 14, 2000. This Appeal followed.

SKELLY STIPULATION

The Appellant stipulated that the Department complied with the due process requirements of *Skelly*.

EMPLOYEE BACKGROUND INFORMATION

Appointments and Classification:

Neither the Department nor Appellant offered any documentary evidence with regard to appointments or classifications. The record herein does, however, appear to reflect that Appellant has been employed by the LAPD since June 28, 1985. She was a senior clerk typist at the time of the Incident herein.

Evaluations:

Neither the Department nor the Appellant offered any of Appellant's Performance Evaluations. It was stipulated, however, that all of Appellant's Performance Evaluations for the last five years were average or above with only one exception, that being in 1997.

Prior Disciplinary Action:

It was stipulated that, during her entire employment with the LAPD, Appellant has had only one prior disciplinary action, consisting of a 22 day suspension in 1992.

The record reflects that the prior suspension arose out of an incident in August of 1992 when Appellant, ". . . while off-duty, became involved in a domestic violence incident. She smashed the window of an off-duty officer's vehicle after she was ejected from his home" (Department Exhibit 2, p. E). In another place, it was asserted that the broken window was in a door of a home.

The record further reflects that this 1992 incident occurred before Appellant knew her present husband, and involved Appellant and an off-duty LAPD officer with whom she had formerly had a dating relationship.

Commendations:

12/7/99: Intradepartmental Correspondence from Commanding Officer, West Traffic Division, congratulating Appellant for assisting a fellow employee home and to a hospital on October 29, 1999 (Department Exhibit 2, p. MMM).

1/10/00: Intradepartmental Correspondence from Commanding Officer, West Traffic Bureau, commending Appellant for ". . . doing an outstanding job in the administrative office . . . ." (Department Exhibit 2, p. LLL).

1/14/00: Intradepartmental Correspondence from Commanding Officer, West Traffic Division, congratulating Appellant as follows: ". . . On 01/13/00 a fellow employee noted your professionalism. You were observed as being a hard worker, and very helpful in the admin office.. . ." (Department Exhibit 2, p. KKK).

1/28/00: Commendation from Commanding Officer, West Traffic Division, stating:

"During the past three months, you have been loaned to the Administrative Section of West Traffic Division. Your outstanding performance as a senior clerk typist has assisted your Commanding Officer and the Day Watch Commander in improving the efficiency of West Traffic Division. I want to commend you for your positive attitude and the teamwork displayed in your approach to problem solving issues related to our systems. Your efforts are appreciated and did not go unnoticed." (Appellant's Exhibit B)

WITNESSES

Called by the Department:

1. LAPD Sergeant Darnell Davenport
2. LAPD Lieutenant Michael Florio
3. LAPD Officer Brenda Hinrichs
4. xxxxx, Appellant's husband
5. Raul Aguirre, husband's co-worker
6. LAPD Officer Anthony Ariaz
7. LAPD Sergeant Richard Lockett

Called by the Appellant:

8. Donna Ehlers, M.D., Appellant's psychiatrist
9. Vickie Jackson, Appellant's friend and hair dresser
10. XXXXXXXXXX, Appellant
11. Jacqueline Jackson, Appellant's friend and sister of Vickie Jackson

SUMMARY OF RELEVANT EVIDENCE PRESENTED

The evidence will be summarized herein separately with regard to each of the five counts alleged as the basis for discharge of Appellant, as follows:

Count 1 – Carrying a Concealed Weapon
Count 5 – Making a False Statement to Dept. Investigators

There is no factual dispute regarding Charge 1. Appellant testified and conceded that she did go to her friend's home with a loaded 357 Magnum pistol concealed in her purse.

She also testified that her reason for doing so was that she was afraid that her husband would use the gun on her, and that the night of the Incident was the first time she had carried a gun with her.

She and xxxxx have been married for five years and have been together for about eight years. She has been fearful of him every month during their relationship because there have been monthly acts of rage on his part. There has been constant domestic abuse consisting of verbal abuse and rage since before they were married, and incidents a few years ago when they wrestled around the floor in their living room and in 1999 when he grabbed her around the neck. He has also twice threatened to kill her. Department Exhibit 2, p. DDD is a LAPD Preliminary Investigation Report of a prior incident in July of 1996 in which Appellant claimed that her husband threatened to kill her. She is fearful when he is in a rage.

On the night of the Incident, she had returned home from a shopping trip with her friend Jacqueline (Jackie) Jackson. Her husband was not home. She had earlier spoken to her husband by phone twice and an argument occurred during the second phone conversation, apparently over whether or not she would bring dinner home for him. The argument left her fearful that he would use a gun on her, and she testified that she knew that there were guns in the house, more specifically a 357 Magnum pistol under her pillow; a 9 mm. pistol under his pillow; one long gun, customarily kept in a closet or under the bed; two more pistols kept in the "junk room;" and one long pellet gun.

She was fearful the night of the Incident because he had seemed "different" over the phone; he was raging over something extremely petty, like dinner.

When she returned home after her shopping trip, it was already dark and she found her husband had taken her car. She wanted to remove all the guns from the house but the 357 Magnum pistol was the only weapon she could quickly find and she put it in her purse and walked to the home of her friend and hair dresser, Vickie Jackson. It was several blocks away on Dalton Avenue.

Some time later, her husband arrived at the Jackson home on Dalton and was in a rage over dinner not being brought. He was yelling for her to come to the door and she went to the door and argued with him, whereupon he threw a set of keys, hitting her in the left eye. The Department's Exhibit 2, pp. NNN through OOO are photocopies of pictures of Appellant's face indicating bruises and swelling both above and below her left eye. Appellant's Exhibit A is a Kaiser Permanente Ophthalmology Department report by Dr. Marlon dated September 30, 1999, indicating traumatic eye injury two days previously.

Appellant further testified that, upon arriving at Dalton, she put her purse in the backyard next to a dog house, not wanting to take the pistol into the house.

After being struck with the keys, she thinks that Vickie Jackson called the police and that Appellant asked Vickie's sister, Jackie Jackson, to bring Appellant's purse inside the house before the officers arrived.

After being struck, Appellant was extremely upset and became hysterical. In a paraphrased statement prepared by Sergeant Davenport, paramedic Michael Morales was quoted as saying that Appellant was "loud, hysterical, emotional and wanted immediate police action" and that he had been a firefighter for 12 years and had never seen anyone behave as Appellant did after a similar injury. Morales did not smell any odor of alcohol on Appellant's breath (Department Exhibit 3, p. F). A second paramedic was quoted as saying that Appellant was in an extremely agitated emotional state and crying, and that he also did not recall smelling any alcoholic odor on her breath (Department Exhibit 3, p. G). Officer Hinrichs also noted in a Domestic Violence Supplemental Report that Appellant was crying, afraid, complaining of pain and exhibiting swelling (Department Exhibit 2, p. CC). LAPD Sergeant Richard Lockett noted in his Daily Report that Appellant ". . . was struck pretty hard" (Department Exhibit 2, p. BBB).

Appellant was unequivocal in her testimony that when the officers arrived at Dalton, she told them that her husband had guns in their house, and also that she had one in her purse there at Dalton. She further testified that an officer stopped her from physically removing the pistol from her purse at Dalton and that he did it instead.

Appellant also testified that she followed the officers back to her own home on Brighton at their request, and was driven there by Jackie Jackson in Jackie's car.

Once back home, police officers did search her home for weapons, but this occurred only after the officers had possession of the pistol which had been in her purse.

Both on direct and cross-examination, Appellant testified that she disclosed the presence of a weapon in her purse to the police officers while still at Dalton, and that no gun was taken from her purse at her own home on Brighton Avenue.

Appellant's testimony about voluntarily disclosing her possession of a handgun at the first residence (Dalton) was supported by the testimony of Vickie Jackson, who testified that she

heard Appellant say that she was fearful and that she had a gun with her. Vickie Jackson also testified that she saw a gun retrieved from Appellant's purse by an officer. Vickie Jackson never went back to Appellant's home on Brighton that night.

Vickie Jackson also testified that she did Appellant's hair that evening and there was no indication that Appellant had consumed any alcohol. Appellant was upset when she arrived because of her husband's prior screaming and yelling because Appellant and Vickie's sister, Jackie, had gone shopping earlier in the day.

Jackie Jackson also testified that Appellant took a pistol out of her purse and gave it to an officer, but Jackie Jackson was not clear as to whether this occurred at Dalton or Brighton.

The Department also called Appellant's husband, xxxxx, who testified that he and the Appellant had been separated for a year and five months at the time of this Hearing. He further testified that he was arrested for spousal abuse on September 28, 1999 but that he really did not have an argument with the Appellant that night, and that he "never touched her." He did concede that he threw her car keys to her at Dalton and that they "accidentally" hit her.

On direct, he testified that he had two BB pistols and one air rifle in his home at the time of the Incident. He also testified that his wife does not generally carry a gun with her and he has never known her to carry a gun prior to this Incident.

Officer Anthony Ariaz testified that he and his partner, Officer Brenda Hinrichs, responded to the domestic violence call first at Dalton and then at Brighton. He retrieved a pistol from Appellant's purse at Brighton, only after her husband alerted him. Ariaz further testified that the Appellant told him that she always carries a gun when she goes to the salon. In his paraphrased statement prepared by Sergeant Davenport, Ariaz was quoted as saying that when he asked Appellant if she was carrying a handgun, she replied, "Oh, yeah, I have one. I just took it for protection, when I went to the beauty saloon [sic]" (Department Exhibit 3, p. I). It was unclear whether the paraphrased statement was referring solely to the night of the Incident.

Sergeant Lockett also testified that he overheard Ariaz ask Appellant why she had a pistol and that Appellant responded that she always carried one. In his paraphrased statement prepared by Sergeant Davenport, Lockett was quoted as saying that Appellant told Ariaz that ". . . she always carries a gun with her when she leaves" and that ". . . she had a gun with her because she went to get her hair done" (Department Exhibit 3, p. M).

On cross-examination, xxxxx testified that the police did retrieve one gun from his home on the night of the Incident. He subsequently also testified that there were two "real" guns in the house that night, a 357 Magnum pistol and a 22 caliber Ruger rifle. He testified that, when he first arrived home, he discovered that the 357 Magnum had been removed from between the box spring and mattress after he noticed the bed was messed up. He testified that he "checks on it regularly," although it had never been missing before.

With respect to the allegedly false and misleading statements which are the subject of the fifth count against Appellant, Sergeant Darnell Davenport testified that he investigated the charges against the Appellant as personnel complaints, and that he interviewed her twice during the course of this investigation, once on October 26 and again on November 11, 1999. Davenport testified that, during both interviews, Appellant stated that she voluntarily gave the 357 Magnum pistol to the officers at Dalton.

As a result of his investigation, Sergeant Davenport prepared a 24-page report dated December 13, 1999. (It was admitted into evidence as the Department's Exhibit 3, pp. A through X.) That report dealt with Counts 1 through 4 against Appellant, and it consists of Sergeant Davenport's paraphrased statements of his interviews with Appellant's husband, Vickie Jackson, two paramedics who responded to the Incident, Raul Aguirre, Police Officers Anthony Ariaz, Brenda Hinrichs, Manuel Zapata, Franck Peter, James Lopez, Michael Sanchez, Richard Amador, and Sergeant Richard Lockett. Davenport's report also notes receipt of a notarized letter from Jacqueline Jackson asserting that she was present at Dalton when an officer recovered a gun from Appellant.

A portion of Davenport's report is a paraphrased statement prepared by him (Exhibit 3, pp. U through W) indicating that he interviewed Appellant on October 26 and November 11, 1999 and that these interviews were tape recorded. No such tape recordings were introduced into evidence.

Davenport's report also indicated that Appellant was interviewed again on November 11, 1999 and, apparently at that time, she reviewed a paraphrased statement of her interview on October 26, 1999 and signed it, indicating that it was accurate and correct. No such signed paraphrased statement was offered into evidence.

Department Exhibit 3, pp. U through W is apparently a paraphrased statement summarizing two other paraphrased statements, neither of which was offered into evidence.

The Department asserted that Appellant did not disclose that she had a pistol in her purse while still at Dalton. Officers Brenda Hinrichs and Anthony Ariaz as well as Sergeant Richard Lockett, all testified that the presence of a pistol in the Appellant's purse was called to their attention by Appellant's husband, after he was taken into custody at Brighton. Their testimony was that Appellant's husband was handcuffed after being arrested and told one officer that Appellant had a pistol in her purse. Both Officer Hinrichs and Sergeant Lockett witnessed Officer Ariaz retrieve the weapon out of Appellant's purse at Brighton.

The testimony of these police officers that the pistol was not voluntarily disclosed by Appellant, and was removed from her purse at her home on Brighton, was confirmed by a report prepared at the time of the Incident by Officer Ariaz (Department Exhibit 2, p. W), and by Sergeant Davenport's paraphrased statements of interviews conducted of four other officers on the scene: Officers Hinrichs, Lopez, Sanchez, and Sergeant Lockett (Department Exhibit 3, pp.

K, R, S and M, respectively). Eight or nine officers and one Sergeant responded to the Incident in all.

Sergeant Lockett testified that Appellant was not arrested the night of the Incident because it had been reported to his watch commander and the watch commander (Sergeant Noland) told him not to make an arrest and that the Wilshire Division authorities had been notified and would handle it administratively.

Count 2 – False Information on an Application For a Domestic Violence Restraining Order

This count was based upon the Department's contention that Appellant gave the Superior Court false information in seeking a restraining order against her husband when she declared that he had "4 weapons and the police found 2 of them," and took them (Department Exhibit 2, pp. OO and PP). Appellant denied that this statement was false both in her testimony at this Hearing and (according to Sergeant Davenport) in his prior interviews of her. Sergeant Davenport, however, testified that, according to his investigation, the police officers found no guns at Appellant's home on the night of the Incident. On cross-examination, however, Sergeant Davenport conceded that the officers found a BB gun. Appellant's allegedly false statement was that the officers found two guns and took them.[2]

Appellant testified that, after the search of her home, she saw two guns that the officers found and assumed that the police took them. Sergeant Ariaz testified that he aided in the search of Appellant's home and found only one BB gun pistol. Sergeant Lockett testified that he noted in his Sergeant's Log that the officers' search turned up two BB guns.

Several of the officers who engaged in the Brighton search were later reinterviewed by an LAPD Sergeant John Denardo at the request of Internal Affairs investigators. On being reinterviewed, the officers who searched Brighton confirmed that one or more pellet guns, BB guns or air guns were found during the search but that they were not taken by the officers. (Department Exhibit 3, pp. Y through HH).

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[2] In her Application for a Domestic Violence Restraining Order, Appellant also related an incident in July of 1999 where her husband choked her and slammed her up against his car, and as she retreated into their home, he continued to scream at her and call her a "stupid bitch" (Department Exhibit 2, p. PP).

She also related an incident in October of 1998 when her husband struck her in the face with a telephone and pulled her hair, allegedly because he became angry that she was on the phone and did not acknowledge him immediately.

During her testimony in his Hearing, Appellant confirmed both of these prior domestic violence episodes.

As noted above, Appellant's husband testified on cross-examination that there were two "real" guns in the house but the record was silent herein as to where the second "real" gun was located during the search of the home, or why the officers did not find it.

Approximately two weeks after the Incident and on October 19, 1999, Appellant turned over to police a 22 caliber Ruger rifle and the Department receipted for it as the property of xxxxx, having been taken into custody from 4166 Brighton Avenue (Department Exhibit 2, p. U).

Counts 3 & 4 – Between Approximately 2/1/95 and 3/31/95, Appellant, While Off Duty, Unnecessarily Choked and/or Struck Her Husband

Appellant's husband, xxxxx, testified that he did tell his co-worker, Raul Aguirre, at one time, that Appellant had grabbed him. She never choked him. Similarly, Mr. xxxxx testified that Appellant did strike him in the face later that same day, with her hand. He considered his wife's actions that day "unnecessary".

The Department also called Mr. Raul Aguirre, a co-worker of Mr. xxxxx, who testified that sometime in 1995 he did notice a bump on Mr. Xxxxx's head or face, and Mr. xxxxx told Aguirre that the Appellant had hit him with a gun. He never discussed it further with Mr. Johnson and has no further details, nor does he know the circumstances involved.

The Appellant testified that she never grabbed, struck or choked her husband in 1995, nor did she ever hit him. She did testify that, in the course of some domestic dispute in prior years, the two of them wrestled around on the floor of their living room.

Sergeant Davenport testified that Appellant's husband told Davenport about some 1995 incident. Sergeant Davenport stated that Counts 3 and 4 are referring to the same incident and that Davenport does not know the circumstances of the incident, nor whether Appellant was defending herself or not.

Count 5 – That on or about 10/26/99 Appellant Made False Statements to Investigating Officers

As a result of the investigation conducted by Sergeant Davenport, the Department apparently added a fifth count of making false statements to investigators on or about October 26, 1999.

The first statement alleged to be false is that the Appellant ". . . told investigators she voluntarily gave the handgun to officers at xxxxx." The Department is also apparently claiming that Appellant made a false statement to the investigators regarding the police recovering and removing two weapons from her home the night of the Incident.

The only evidence of what Appellant said at her interviews with the investigators consists of the testimony of Sergeant Davenport and his paraphrased statement of what Appellant allegedly said (Department Exhibit 3, pp. U through W). That paraphrased statement is apparently a summary of two other paraphrased statements, neither of which was offered in evidence.

In his testimony, Sergeant Davenport stated that, during both of his interviews with the Appellant, she said she voluntarily disclosed and gave the 357 Magnum pistol to the officers at Dalton. At the time of the hearing, Appellant testified similarly; she stated that she gave the pistol to the officers while she was at Dalton and that no guns were taken from her purse at her home on Brighton.

In his paraphrasing of the previous paraphrased interviews (Department Exhibit 3, pp. U through W), Sergeant Davenport noted that, during his interviews, Appellant denied the allegations of Count 2 but admitted that the officers found no guns during their search on the night of October 28, 1999. She explained to Davenport, however, that the officers did find two air pistols, which she thought they took. When she wrote in the Application for a Restraining Order that the police took two guns, she was referring to those pistols and explained that she didn't know the difference between a "real gun" and an "air pistol". She further told Davenport that, after obtaining the restraining order, she discovered that the police had not confiscated any "real" firearms. (Department Exhibit 3, pp. Z through W).

The other evidence with respect to the allegedly false statements made to Department investigators has also been set forth above at length when discussing Counts 1 and 2.

Other Relevant Evidence

Appellant testified that, while at the Wilshire Division, her duties involved occasionally supervising other clerk typists, typing reports, assisting the Captain with typing of his reports, answering a drug hotline, and performing other clerical duties.

Subsequently, and while on assignment at the West Traffic Division, her duties consisted of assisting the Captain with mail; typing; transporting paperwork to other bureaus; answering telephone calls; updating personnel files; and filling in for the adjutant.

Dr. Donna Ehlers, a psychiatrist, was called and testified on behalf of the Appellant. Appellant has been under her treatment at Kaiser since 1995 for major depression. During the course of treatment, Appellant has disclosed her husband's guns in their home and the fact that he's controlling. Appellant expressed fear of her husband.

Dr. Ehlers further testified that Mr. xxxxx was the "aggressor" and that she had found him uncooperative, even though he was aware that he was abusive.

The Department offered its Exhibit 2, p. FFF, which was a written statement from Dr. Ehlers dated January 28, 2000, confirming Appellant's treatment and noting that, despite crisis intervention, Appellant's husband has been resistant to treatment over the last few years. The Doctor further noted that the Appellant had been undergoing severe personal stressors, often manifested by crying episodes and hysterical outbursts. The Doctor stated that Appellant has "never demonstrated any violent behavior," and that her prognosis was very good.

LAPD Lieutenant Michael Florio was also called by the Department. He testified that he has been employed by the LAPD for 26 years and that he has been a Lieutenant at the Wilshire Division for two years and three months. He has reviewed approximately 350 personnel complaints.

He did not make the recommendation to discharge the Appellant. He briefed Captain Powers and the Captain made that decision, based upon the following factors:

1. The severity of the offense of carrying a loaded firearm;

2. Allegations of intoxication at that time;

3. False statements made to a court to obtain a restraining order;

4. False statements made to Department investigators regarding the firearm and its discovery.

Lieutenant Florio further testified that he reviewed the Appellant's personnel history and noted a prior sustained complaint regarding off-duty domestic violence involving a man with whom Appellant had a dating relationship. That man was an off-duty police officer.

Lieutenant Florio also testified that the prior incident [which occurred in 1992] involved violence, as did the instant Incident.

Lieutenant Florio, referring to Department Exhibit 1 (the Guide to Disciplinary Standards), testified that Appellant's conduct in this Incident constituted possible violations of several offenses set forth in these guidelines. Lieutenant Florio did not consider B nor did Captain Powers B the specific guidelines set forth in Department Exhibit 1, when coming to a recommended decision to discharge. Captain Powers alone made that decision after conferring with Lieutenant Florio.

Captain Powers did not appear to testify in this matter.

When asked how Appellant's alleged conduct (as set forth in the five counts against her) affected her job or job performance, Lieutenant Florio testified that:

Regarding the concealed weapon in Count 1, if she carried such a weapon at work, that would constitute a violation of law and could put other employees at risk.

Regarding the Application for a Restraining Order, false information in that application could put Appellant's husband at risk; it was inconsistent with what the LAPD looks for in employees, and constitutes a breach of the court process. False statements on such a court application bears upon an employee's integrity in dealing with official police documents. That integrity must be beyond reproach and falsification on a court document would be an indication of untrustworthiness.

Regarding Counts 3 and 4, respecting Appellant unnecessarily choking or striking her husband, Lieutenant Florio testified that the Police Department is subject to criticism regarding failures in the area of domestic violence. He further testified that sworn personnel are the same as unsworn personnel; if such people are violent off-duty, there's a risk of workplace violence also.

Regarding Count 5 and the allegation of false statements to Department investigators, Lieutenant Florio testified that the Department has zero tolerance for false statements, and such conduct is inconsistent with employment by the LAPD.

Finally, Lieutenant Florio testified that he has no knowledge of any violence in the workplace by the Appellant.

DISCUSSION AND CONCLUSIONS

The Department has the burden of proving each material fact by a preponderance of the evidence. "Preponderance" of the evidence has been defined as 51% or more in favor of the establishment of a particular fact or position. In addition to *quantity* of evidence, however, the legal concept of preponderance of evidence also takes into account the *quality* of evidence offered. It is here that credibility often plays an important part.

Count 1

There is no factual dispute as to whether or not Appellant carried a loaded, concealed handgun in her purse when she went to Dalton on the evening of September 28, 1999. The Department, however, has charged that she carried the weapon "without legal authority when [she] knew or should have known it was required".

Appellant has testified that she feared for her life that night because her husband had gone into a rage over what she considered to be a trivial matter. She testified that she took the pistol in order to deprive him of its use. Both she and her husband testified that this was the first time she had ever carried a concealed weapon.

Appellant testified that her husband had made prior threats to kill her. One such incident where death threats were made is contained in the Department's own Exhibit 2 at page DDD, which is a police report alleging those threats in July of 1996.

Appellant's fear of her husband was also confirmed in the testimony of her psychiatrist, Dr. Donna Ehlers.

This Hearing Officer does not have the jurisdiction to determine whether or not the Appellant unlawfully violated the Penal Code by carrying a concealed weapon on the night of the Incident. Such a determination can only be made in a criminal court. It is noted, however, that California Penal Code ' 12025.5(b) provides that, in a trial for violating the concealed weapon statute, a trier of fact is required to determine whether or not the defendant was acting out of a reasonable belief that he or she was in grave danger. That is a defense to the charge.

No such determination has ever been made with respect to Appellant's conduct during the Incident. As a matter of fact, Appellant was not even arrested as a result of the Incident. It would be pure speculation to try to determine why she was not arrested if, in fact, the circumstances of the Incident justified a concealed weapon charge.

In light of facts presented at this Hearing, the Department has not met its burden by a preponderance of the evidence to show that removing the pistol from her home and carrying it in her purse was without legal authority and not out of a reasonable belief that she was in danger if her husband got possession of that weapon.

There is no factual dispute as to whether or not Appellant carried a loaded handgun in her purse that night. The sole question is whether or not it was justifiable under the circumstances and, as to that question and in light of the evidence in this case, the Department has failed to meet its burden by a preponderance of the evidence.

Count 2

This count alleges that the Appellant gave false information on an Application for a Domestic Violence Restraining Order. Specifically, the Department asserts that Appellant made a false statement when she declared that the husband had "4 weapons and the police found 2 of them" and took them. This charge apparently arose out of Sergeant Davenport's personnel investigation wherein he interviewed eight of the officers who participated in the arrest of Appellant's husband and the search of their home on Brighton the night of the Incident. Not one of these eight officers was reported (at least in Davenport's paraphrased statements) to have found a BB gun or pellet gun during the search. Such items are not even mentioned (*see* Department Exhibit 3, pp. B through N, and R through T).

When these same officers were reinterviewed, however, by a different Sergeant, several recalled finding one or more pellet, BB or air guns, and some of these same officers remembered that Appellant saw those guns (*see* Department Exhibit 3, pp. Y through GG).

Appellant testified that she saw two guns that the police retrieved during their search of her home. She further testified that she didn't know the difference between a "real" gun and a "air gun", but that she assumed that the police took the two guns she saw that night and that this was the basis of her statement in the Application for a Restraining Order. She told Davenport that it was only after she obtained the Restraining Order that she discovered that the officers had not taken any "real" firearms.

There is no doubt that Appellant and her husband had real firearms in their home. After first testifying only to having two BB pistols and an air rifle, Appellant's husband finally admitted that he also had a 22 caliber Ruger rifle and a 357 Magnum pistol.

Further, two weeks after the Incident and her separation, Appellant found and turned over to the police the Ruger rifle and the LAPD receipted for it on October 19, 1999 (Department Exhibit 2, p. U).

Appellant's testimony in this regard is consistent with the paraphrased statement prepared by Sergeant Davenport after interviewing the Appellant. Together with the information provided after reinterviewing the eight participating officers, there was no reasonable basis for bringing Count 2 against the Appellant. For these reasons, the Department has failed to meet its burden of proof with respect to Count 2.

Counts 3 and 4

These counts apparently refer to the same incident in 1995. The Department asserts that between approximately February 1 and March 31, 1995, while off-duty, the Appellant unnecessarily choked and/or struck her husband.

The record in this matter reflects, however, that the Appellant has been the victim of spousal abuse and violence during the years of her relationship with her husband. Appellant's psychiatrist testified unequivocally that xxxxx was the aggressor in this domestic abuse situation. Dr. Ehlers further testified that she found Mr. xxxxx "uncooperative" and "aware that he was abusive".

Moreover, xxxxx himself testified that his wife did not choke him but that she did strike him with her hand.

The Department also called Mr. Xxxxx's co-worker, Raul Aguirre. Mr. Aguirre testified that some time in 1995, he saw a bump on Mr. Xxxxx's face or head and xxxxx told Aguirre that Appellant had hit him (xxxxx) with a gun.

These varying stories make one question whether or not the Department's Counts 3 and 4 relate to the same event testified to by xxxxx and Aguirre. Once again, it appears that Counts 3 and 4 arose out of interviews conducted by Sergeant Davenport of Mr. xxxxx and Mr. Aguirre.

There was absolutely no evidence in this matter to support a finding that, if Appellant struck or choked her husband some time in 1995, that it was not in self-defense or as part of a mutual physical confrontation. Appellant conceded that, some time in the past, she and her husband had "wrestled on the floor".

The charges in Counts 3 and 4 that Appellant "unnecessary" used physical violence on her husband in 1995 have not been proven by a preponderance of the evidence.

Count 5

This count alleged that Appellant, while on duty, made false statements to Sergeants D. Davenport and W. Winston on or about October 26, 1999.

Sergeant Davenport conducted an investigation of the personnel complaint brought against Appellant and he interviewed the Appellant at the Wilshire Community Police Station on October 26 and again on November 11, 1999.

The only writing memorializing those interviews was Sergeant Davenport's paraphrased statement in evidence herein as Department Exhibit 3, pp. U through W. That paraphrased statement itself notes that the interviews were tape recorded. No such tape recordings were offered into evidence.

That Exhibit also reflects that the two separate interviews were each later paraphrased by Sergeant Davenport, but those paraphrased statements were not offered into evidence either.

The sole evidence of what Appellant said during those interviews consists of Sergeant Davenport's testimony in this Hearing and the "summary" or further paraphrasing (for lack of a better term) of the two paraphrased statements not offered into evidence. No explanation was offered as to why the original paraphrased statements or the original tapes were not available.

Nevertheless, as a result of Sergeant Davenport's interviews, the Department charges the Appellant made two false statements, as follows:

1. That the police officers found and took two guns from the Brighton home on the night of the Incident; and

2. That Appellant lied when she stated that she voluntarily revealed that she had a pistol in her purse while still at Dalton, whereas the Department asserts that the officers learned of that concealed weapon only at Brighton after they were alerted to it by Appellant's husband.

As noted above in discussing Count 2, the Department has failed to prove that Appellant made a false statement in applying for a Restraining Order when she declared that her husband had four guns and that the police had taken two of them. As noted above, the record herein

supports Appellant's assertion that she reasonably believed that the officers had found two guns as a result of their search and she reasonably assumed that the police took them. It was only later that she determined that the guns she saw that night were BB guns or pellet guns and learned that the police had not taken them.

Her reasonable belief that there were guns in the home was supported also by the fact that the police did retrieve a 357 Magnum that night, and Appellant surrendered a 22 caliber Ruger rifle to them approximately two weeks later. (The rifle had apparently either been removed from the house during the search or hidden in some way so that the search did not disclose it.) For these reasons, the Department has failed to meet its burden to show that the first allegedly false statement above was, in fact, false.

A different situation pertains to the second allegedly false statement with regard to whether Appellant revealed a pistol in her purse at Dalton or whether, as the Department asserts, she never revealed its presence but it was retrieved from her at Brighton after her husband alerted the officers.

There is no question that the Appellant has consistently asserted that she placed the handgun in her purse in order to deprive her husband of its use, and that she voluntarily disclosed the fact that she had it when the officers responded at Dalton. Sergeant Davenport testified that during both of his interviews with Appellant, she said that she disclosed the presence of the pistol in her purse voluntarily and gave it to the officers at Dalton.

Appellant testified to the same effect during her testimony at this Hearing. She was definite that the pistol was disclosed and surrendered by her at Dalton, and not taken from her at Brighton.

Appellant was supported in this position by the testimony of her friend and hair dresser, Vickie Jackson. Vickie Jackson testified that she saw the pistol retrieved from Appellant's purse by an officer. Vickie Jackson did not go to Brighton with the Appellant and it is therefore apparent that either Vickie Jackson and the Appellant are correct, or that the two of them have testified falsely.

Appellant's other friend, Jacqueline Jackson, also testified that Appellant took the gun out and gave it to the officers, but her testimony was not clear as to where that occurred, Dalton or Brighton.

On the other hand, three police officers testified directly that the pistol was taken from Appellant's purse by Officer Ariaz at Brighton. These Officers were Hinrichs, Ariaz and Sergeant Lockett. They confirmed that the presence of a pistol in Appellant's purse was first disclosed by Appellant's husband B not by the Appellant. This version was corroborated by Officer Ariaz' report of the Incident, in the arrest report prepared by him right after the Incident and in evidence as the Department's Exhibit 2, pp. V through X. It was also corroborated by the paraphrased statements prepared by Sergeant Davenport of his interviews of Officers Amador, Usma and Sanchez (Department Exhibit 3, pp. CC, DD and FF, respectively).

Based upon this testimony and evidence, the Department has met its burden of proving that Appellant made a false statement to Sergeant Davenport during his interview of her, with respect to voluntarily disclosing and surrendering the pistol while at the Dalton Avenue address.[3]

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[3] Neither side will win any "credibility awards" in this case. The Department's case suffers overall because its Counts 2, 3 and 4 were based on such flimsy evidence (or a failure to analyze and appraise the actual evidence).

Despite that overall weakness, however, there were just too many officers who saw the pistol being taken from Appellant's purse at Brighton, for Appellant to be believed on that point.

FINDINGS

1. The due process provisions of *Skelly* were met by the Agency.

2. The Department has failed to meet its burden of proof regarding Count 1 and its allegation that, "On or about September 28, 1999, you, while off duty, carried a loaded, concealed handgun, without legal authority, when you knew or should have known it was required".

3. The Department has failed to meet its burden of proof regarding Count 2 and its allegation that, "On or about September 30, 1999, while off duty, Appellant documented false information on an official Los Angeles County Court Restraining Order, when she knew or should have known it was false".

4. The Department has failed to meet its burden of proof with regard to its allegation in Count 3 that, "Between approximately February 1, 1995 and March 31, 1995, Appellant, while off duty, unnecessarily choked xxxxx".

1. The Department has failed to meet its burden of proof with regard to its allegation in Count 4 that, "Between approximately February 1, 1995 and March 31, 1995, Appellant, while off duty, unnecessarily struck xxxxx's face".

2. The Department has failed to meet its burden of proof regarding that portion of Count 5 alleging that Appellant, while on-duty, made false statements to Sergeant D. Davenport to the effect that the police officers found and took guns from her home on the night of the Incident.

3. The Department has met its burden of proving that, on or about October 26, 1999, Appellant, while on duty, made a false statement to Sergeant D. Davenport to the effect that she had voluntarily disclosed the presence of a handgun in her purse while she was with responding officers at xxxxx on the evening of September 28, 1999.

APPROPRIATENESS OF PENALTY

Having come to the conclusion that the Department has failed to meet its burden of proof with regard to the off-duty conduct alleged in Counts 1 through 4 and part of Count 5, it remains to be determined what, if any, discipline is appropriate under the very unique circumstances of this case.

The Appellant asserted that she carried a concealed weapon out of fear of her husband. The Department failed to rebut Appellant's evidence on this point. Appellant, therefore,

successfully asserted a justification to a charge of carrying a concealed weapon. That is one thing. Not telling the truth about some of the circumstances of carrying that weapon is another matter.[4]

The central issue is whether falsely claiming to a Department investigator that she voluntarily disclosed the presence of the pistol warrants discharge from the Department.

This case is more than somewhat unique because it involved allegations of off-duty misconduct (unjustifiably carrying a concealed weapon), which were not proven but which were then "turned into" on-duty misconduct because Appellant was interviewed on duty in a police facility. Had she been interviewed at home, for example, her false statements would also have been "off-duty".

It is generally accepted that an employer can discipline an employee for off-duty misconduct if there is a workplace "nexus" or "connection". That nexus or connection to the employer's interests is what justifies discipline for off-duty misconduct. It is said that such a nexus or connection is established if the employee's off duty conduct: (1) harms the employer's business; (2) adversely affects the employee's ability to perform his or her job; or (3) leads other employees to refuse to work with the offender.

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[4] This case represents a classic example of the dangers inherent in using paraphrased statements. In short, the Department could have offered into evidence the actual tapes made of its interviews with Appellant. Moreover, the Department could have offered into evidence the Appellant's paraphrased statement of her October 26, 1999 interview (which the Department claimed Appellant reviewed and signed, attesting to its accuracy). Neither of these things were done. Because of that, it cannot be determined from the record herein exactly what Appellant did say to the investigator, Sergeant Davenport.

However, using the "paraphrased statement of the prior paraphrased statements" (Department Exhibit 3, pp. U through W), in conjunction with Sergeant Davenport's direct testimony in this matter, as well as Appellant's testimony at this Hearing that she voluntarily disclosed the pistol at Dalton, it is reasonable to conclude that Appellant gave false information to the investigator on that point.

It is further accepted that an employer can impose discipline for off-duty conduct by establishing the conduct's relevance or notoriety: it has relevance when it relates to and harms the employer's affairs. It is notorious when, even if not otherwise "relevant", it becomes so widely known and is so deplorable that it harms the employer's interests or reputation.

With regard to public sector employers, as in the present case, it can be argued that the same standard should apply as with private sector situations. In one case where a Department of Public Works employee was reinstated after he had been discharged after pleading guilty to off-duty possession of illegal drugs, an arbitrator stated:

> "The City does have certain unique qualities which must be upheld in its public dealings, but the Grievant does not fit into the group in which these qualities rest. Police officers should be free of criminal taint. Firemen should be void of the tinge of pyromania. Controllers and treasurers should be free of the suspicion of embezzling tendencies. Although these examples are not exhaustive, those people not falling within these job classifications should not be required to show any greater virtues than anyone else not so employed. City service, in and of itself, does not deprive a man of the normal inadequacies and failures to which all of human nature is entitled." *City of Wilkes-Barre*, 74 LA 33, 36 (Dunn, 1980) [as quoted in *Discipline and Discharge in Arbitration*, Committee on ADR in Labor and Employment Law Section of Labor and Employment Law, American Bar Association (1998), at page 314].

Similarly, and especially with regard to off-duty misconduct, it has been held that public sector employers may desire to enforce their own codes of conduct regarding off-duty activity, but that they are ". . . entitled to do so only to the degree that there is a direct and demonstrable relationship between the elicit conduct and the performance of the employee's job or the job of others . . . ." *Id*., at page 315.

As noted above, it appears that the off-duty act of carrying a weapon was "transformed" into on-duty misconduct when Appellant gave false information to the Department's investigator. While a sworn police officer might be properly held to a very high standard with regard to off-duty misconduct (as well as statements made to Department investigators regarding that off-duty conduct), a very different situation exists with regard to discharging a civilian clerk-typist on the same basis.

Certain things stand out in this case: The first is that Appellant is clearly the victim of spousal abuse B not its perpetrator. The testimony of Lieutenant Florio, the highest ranking Department official to testify in this matter, suggests that the Department may have confused the victim with the aggressor in Appellant's domestic situation.

Secondly, the record reflects that Appellant has been employed by the Police Department for just over 15 years, and that during that time there has been no on-duty misconduct of any sort, let alone violence on her part. Lieutenant Florio confirmed this after testifying that he had reviewed Appellant's personnel file.

The only misconduct in the record relates to a 1992 off-duty incident in which Appellant was apparently rejected by a man with whom she formerly had a relationship, and she broke a window after being ejected from the man's home. The parties stipulated that this outburst resulted in a 22-day suspension and was the only discipline suffered by Appellant during her 15 years of employment with the Department.

It is also noted that the record herein contains four recent commendations earned by Appellant for her service with the Department. It is noted especially that the latest of these commendations (Appellant's Exhibit B) was glowing in its praise, and was issued on January 28, 2000 but related back to Appellant's performance during the prior three months. This three month period was approximately the time when Appellant was first separated from her husband and free of that source of stress.

It is further noted that the parties herein have stipulated that, during her last five years of employment, Appellant has enjoyed performance evaluations which were all average or above average with only one exception.

This case is also unique in that the Department official who initially recommended a discharge, Captain Powers, did not testify at the Hearing. Lieutenant Michael Florio did testify that he briefed Captain Powers, but that it was the Captain who made the decision.

Lieutenant Florio stated that Caption Powers based his decision on four factors. They were noted in the evidence section above. Suffice to reiterate that the Department failed to show by a preponderance of the evidence that Appellant carried a concealed weapon without justification. The allegation that Appellant was intoxicated during the Incident was also not supported by the evidence, and there was inconclusive evidence on both sides of this question. The allegedly false statements made to obtain a Restraining Order were shown at this Hearing to have been true statements, to the best of Appellant's knowledge. It was only the Appellant's false statement regarding the discovery of the firearm that was proven by the Department.

Lieutenant Florio testified that the Department has "zero tolerance" regarding false statements. No such written policy was offered by the Department, however. Even assuming that such a policy was unwritten but understood throughout the civilian ranks of the Department, it would be difficult to justify termination based upon one instance of a false statement under the overall circumstances of this case.

Finally, Lieutenant Florio indicated that the Captain's decision was also partially based on the fact that there was a prior sustained complaint against the Appellant involving violence.

That event in 1992 involved Appellant breaking a window in a fit of pique. It has no relationship to the present 1999 Incident in which Appellant was the victim, not the perpetrator.

Lieutenant Florio also cited several provisions of the City's *Guide to Disciplinary Standards* (Department Exhibit 1, pp. A through Q) which he testified "might apply" but which were not considered in the Captain's decision to recommend discharge.

Lieutenant Florio testified that the Department holds civilian employees to the same standards as sworn police officers. That does not seem reasonable under the circumstances of this case and with respect to a non-decision maker, such as a Department clerk-typist.

The record herein reflects that Appellant has personal problems, as all people do. Hers may be more serious than some peoples' but the record reflects that she is seeking appropriate treatment for these problems and that she has served the Department well as a clerk-typist.

Appellant is not a heroine. Her false statements to the Department investigator are not to be commended. They were wrong, but they do not justify termination of an employee after 15 years of service. It is believed that the misconduct established by the Department justifies a 30 working day suspension rather than discharge.

RECOMMENDATIONS

It is recommended that the Board of Civil Service Commissioners find:

4. That the due process provisions of *Skelly* were met.

5. That the cause of action in Count 1 not be sustained.

6. That the cause of action in Count 2 not be sustained.

7. That the cause of action in Count 3 not be sustained.

8. That the cause of action in Count 4 not be sustained.

9. That the cause of action in Count 5 be sustained regarding only Appellant's false statement respecting the voluntary disclosure of the pistol while at Dalton.

10. That the cause of action in Count 5 regarding the alleged false statement with respect to the officers' finding and taking firearms on the night of the Incident, not be sustained.

11. That the discipline imposed on Appellant consist of a 30 working day suspension, rather than discharge.

12. That upon completion of the 30 working day suspension, Appellant be found fit and suitable for continued employment with the Department, and be transferred to the West Traffic Division where she seems to perform especially well, or to another suitable assignment.

Dated: February 27, 2001

Respectfully submitted,

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ERNEST S. GOULD
Hearing Examiner